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DISTRICT IV/III

December 30, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP2810-CRNM State of Wisconsin v. John J. Bangart (L. C. #2012CF129)

Before Hoover, P.J., Stark and Hruz, JJ.

Counsel for John Bangart has filed a no-merit report concluding there is no basis to challenge Bangart's conviction for seventh-offense operating with a prohibited alcohol concentration, contrary to WIS. STAT. § 346.63(1)(b). Bangart was advised of his right to respond and has not responded. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised and summarily affirm.

Any challenge to the sufficiency of the evidence would lack arguable merit. We must view the evidence in the light most favorable to the verdict and must sustain the verdict unless no reasonable juror could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507-08, 451 N.W.2d 752 (1990). The jury is the arbiter of witness credibility, and this court will not overturn the jury's credibility assessments unless they are inherently incredible or in conflict with fully established or conceded facts. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583-84, 230 N.W.2d 824 (1975).

Vickie Riley testified that she contacted police to have Bangart removed from her property following a dispute over payment for a bearskin rug. Riley testified Bangart was "getting out of hand, verbally abusive, threatening this, that." Riley also testified that based on what she saw "with his speech and his walking," Bangart was under the influence.

Police observed Bangart had slurred speech. Bangart denied driving to Riley's residence, but after being asked how his vehicle got there, Bangart admitted driving. Bangart also initially told police that he drank one beer after arriving at Riley's property, but he later claimed "that he had two beers and that they were really large beers," and that "he was parked by the shed drinking." Riley testified, however, that Bangart never parked by the shed.

Bangart failed field sobriety tests and a breath test indicated a blood alcohol content of .23. Police found four unopened cans of beer in Bangart's vehicle, and also an empty can, a half-empty can, and another can with some contents missing.

Bangart testified in his own defense. He admitted driving to Riley's residence but insisted, "I didn't drink no alcohol until I got to Ms. Riley's house." Bangart claimed that within forty-five minutes of arrival, he drank two shots of whiskey and four sixteen-ounce cans of beer.

He testified he drank the whiskey "to numb my front tooth, because [a bad toothache] was killing me, th[e] pain was so bad." He claimed he drank the beer, in part, "to wash that nasty whiskey out of my mouth."

Bangart disputed the officer's testimony that two of the beer cans found in the vehicle were partially full of beer. Bangart testified he "had to go to the bathroom" and urinated in one of the cans, "[t]hat's what was in them two cans." Bangart also denied initially telling police he did not drive to Riley's residence. He admitted he may have initially told police that he had one beer upon arrival at Riley's "because that alcohol already had me buzzed. So I can't swear to what exactly my words were that I said to them how much."

Bangart also admitted he did not tell police "anything about this whiskey" because "they were just there for a disturbance. I didn't think it really mattered what I drank on [Riley's] property." When questioned why police did not find the half-pint whiskey bottle in the vehicle, Bangart testified, "[T]he back seat was folded down and it was newspapers there. I just put it in them newspapers." Bangart denied lying to police when asked how much he had to drink, stating, "I just didn't tell them I had the whiskey. They didn't ask me about any booze. I just didn't say it."

Clearly, there was evidence that was more than sufficient to support the jury's guilty verdict. The jury was entitled to disbelieve Bangart's story. The circuit court also correctly recognized that a lay witness such as Riley, who had the opportunity to observe the facts upon which to base her opinion, may give an opinion as to whether a person at a particular time was intoxicated. *See* ***City of Milwaukee v. Bichel***, 35 Wis. 2d 66, 69, 150 N.W.2d 419 (1967). After consultation with trial counsel, Bangart also stipulated this was his seventh offense.

The record also discloses no basis for challenging the court's sentencing discretion. The court considered the proper factors, including Bangart's character, the seriousness of the offense and the need to protect the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The sentence imposed of three years' initial confinement and four years' extended supervision was authorized by law and not unduly harsh or excessive. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the record discloses no other issues of arguable merit. Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Richard Yonko is relieved of further representing Bangart in this matter.

Diane M. Fremgen
Clerk of Court of Appeals